02-510

Supreme Court U.S.
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IN THE

Supreme Court of the United States

SALLY FERNANDES,

Petitioner,

—v.—

VIACOM, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This shareholder state court class action challenged the fairness of a stock-for-stock acquisition offer by majority shareholder Viacom, Inc. ("Viacom") for the minority public shares of Infinity Broadcasting ("Infinity"). The plaintiffs, minority shareholders of Infinity, claimed that defendants were breaching state law duties of loyalty and care in failing to provide adequate value for the Infinity shares being acquired. The Delaware Court of Chancery consolidated several putative class actions and appointed Milberg Weiss Bershad Hynes & Lerach LLP ("Milberg Weiss") and Abbey Gardy & Squitieri, LLP ("Abbey Gardy") as co-lead counsel, and the Delaware firms of Rosenthal Monhait Gross & Goddess, P.A. and Chimicles & Tikellis as co-liaison counsel.

Thereafter, class counsel reached a settlement with the defendants that resulted in an increase in the compensation paid to Infinity's shareholders as well as other relief. Following notice to the class, the parties presented the settlement to the Court of Chancery at a hearing on the fairness, adequacy and reasonableness of the settlement (Pet. App. at 23a). At the fairness hearing, the Chancellor heard arguments from a class member who opposed the settlement (the petitioner), who filed objections and appeared in court through counsel.[1] Petitioner argued that the increased compensation for class members was illusory, the attorneys' fee was too high, and the representative plaintiffs had not adequately represented the class. The Court of Chancery approved the settlement, holding, *inter alia*, that the class had been adequately represented (Pet. App. at 23a).

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[1] The original objector was Len Fernandes. After his death, petitioner Sally Fernandes was substituted as the objecting party by order of the Delaware Supreme Court. Fernandes was the sole objector to the settlement.

On appeal, petitioner challenged, among other things, "the Chancellor's determination that the named plaintiffs adequately represented the class as required by Court of Chancery Rule 23(a)(4) and implied in Rule 23.1." (Pet. App. at 8a-9a).[2] The Delaware Supreme Court rejected petitioner's attacks on the representative plaintiffs and their counsel and affirmed the Chancellor's decision.

This petition for a writ of *certiorari* followed.

REASONS FOR DENYING THE PETITION

A. The claimed constitutional issue is not presented on the record.

Petitioner claims that the record of this case raises serious questions as to whether the representation by the named plaintiffs satisfied the requirements of the Due Process Clause. The record in this case demonstrates that there is no substance to this claim.

Petitioner's *entire* reason for asserting that representation of the class was so inadequate as to violate the federal Constitution is found in a few answers culled from the deposition testimony of Arthur Abbey, the senior partner of Abbey Gardy and one of the attorneys for the class, taken after the settlement was entered into and notice disseminated to absent class members. Specifically, petitioner points to Mr. Abbey's testimony that he could not then recall his client's name, had not personally spoken with that individual, and did not specifically know whether the client had been consulted about the settlement. These selections from Mr. Abbey's

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[2] Delaware Court of Chancery Rule 23 governs class actions in that state. Rule 23(a)(4) requires that the representative plaintiff adequately represent the class. Rule 23.1 governs shareholders' derivative suits. The Delaware Chancery Court rules generally parallel the Federal Rules of Civil Procedure.

deposition testimony, which were already brought to the attention of the Delaware Supreme Court, constitute petitioner's sole basis for requesting review in this Court.

Even examining Mr. Abbey's deposition transcript in isolation from other evidence of record, it is clear that no constitutional issue is presented. Failure to recall a client's name at a deposition taken after the fact does not amount to a constitutional violation. As to the alleged failure to communicate with the client, Mr. Abbey's testimony did not support petitioner's claims. In portions of his deposition not cited by petitioner, Mr. Abbey testified that other lawyers in his firm who he worked with were charged with consulting the client:

> "Q. Who would know the answer to that question [whether the client had been consulted about the settlement]?
>
> A. The people in the firm who normally handle that.
>
> Q. For example, Ms. Fisch?
>
> A. Ms. Fisch, Mr. Gardy, Maybe—there may be others, but I don't know."

(Resp. App. at 1a). Thus, contrary to the implications in the petition, Mr. Abbey *never* testified that his firm's client had not been consulted, but only that he, personally, had not done so. The record evidence does not substantiate the claim that Mr. Abbey's firm, or its client, provided representation for the class that was so inadequate as to raise questions under the Due Process Clause.

Further, in relying on snippets from Mr. Abbey's deposition, petitioner fails to inform the Court of other relevant evidence, presented to the courts below, bearing

on the issue of adequacy of representation. For example, although petitioner faults Mr. Abbey for not knowing whether the client had been consulted about the settlement, the courts below had before them affidavits from each of co-lead counsel's clients stating that he or she approved of the settlement. (Resp. App. at 2a-5a).

Plaintiffs also introduced the declaration of another of plaintiffs' lead attorneys, U. Seth Ottensoser of the Milberg Weiss firm. (Resp. App. at 6a-7a). Mr. Ottensoser testified that:

- his firm had a lawyer-client relationship of many years' standing with representative plaintiff Eugenia Gladstone Vogel;
- he regularly consulted with Ms. Vogel while settlement negotiations were underway;
- he conveyed the terms of the proposed settlement to Ms. Vogel before an agreement in principle was reached;
- he explained events in the litigation to her;
- he advised her of the risks of further litigation;
- Ms. Vogel advised him that she agreed with the terms of the proposed settlement; and
- Ms. Vogel authorized his firm to settle the matter.

Mr. Ottensoser's unrefuted sworn statement establishes that representative plaintiff Vogel provided constitutionally adequate representation to the class. Nothing more was required.

Other evidence presented to the courts below indicates that the litigation and settlement negotiations on behalf of the class were contentious, hard-fought and adversarial. (Resp. App. at 9a-11a, 14a-17a). All class mem-

bers received notice of the proposed settlement and the opportunity to object. At the fairness hearing, counsel introduced evidence indicating that the lead plaintiffs, Infinity shareholders, were adequately informed, consulted, and involved in the litigation process, and that this consultation process included approval of the settlement. (Resp. App. at 2a-7a). The Chancellor was made aware of class counsels' efforts at negotiating a higher price, conducting discovery, retaining expert witnesses, and evaluating complex financial data. (Resp. App. at 9a-17a). In the face of vigorous objection, the Chancellor reviewed the requirements under Delaware's Rule 23, including the requirement of adequate representation, in concluding that the lead plaintiffs and their counsel were adequate and that the class should be certified for settlement purposes under all relevant criteria. (Pet. App. at 18a, 23a). On petitioner's appeal, the Delaware Supreme Court, after full briefing and argument, affirmed the result reached by the Delaware Court of Chancery.

In short, the courts below had before them more than adequate evidence that would support the adequacy of representation under any reasonable interpretation of the Due Process Clause. All the indicia of fair process, including notice and an opportunity to be heard, were satisfied. Petitioner's after-the-fact constitutional objections rest on selective and distorted quotations to the record below. Thus, the facts of record do not raise a substantial federal question.

B. The claimed federal issue was not properly presented to or decided by the courts below.

This Court will generally decline to grant *certiorari* as to issues that have not properly been presented to or decided by the court below. *E.g., Campbell v. Louisiana,*

523 U.S. 392, 401 (1998). In the present case, petitioner's sole basis for claiming that a constitutional issue was raised in the Delaware Supreme Court is a single, uninformative citation in her opening and reply briefs in that court to an earlier Delaware decision, *Prezant v. DeAngelis*, 636 A.2d 915 (Del. 1994).

In her opening brief, petitioner included a quotation from *Prezant* to the effect that "the Due Process Clause of the United States Constitution requires that the named plaintiff at all times adequately represent the interests of the absent class members." This short and ambiguous comment is hardly the kind of argument that would place the Delaware Supreme Court on notice that an important constitutional issue was being submitted for review. The court viewed petitioner's arguments relating to adequacy of representation as a challenge under Delaware's standards for satisfying the requirements of Court of Chancery Rule 23.

Because petitioner's due process arguments were not "properly presented to [ ] the state court," *Adams v. Robertson*, 520 U.S. 83, 86 (1997), the court below was not "fairly put on notice as to the substance of the issue." *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000). Petitioner does not provide this Court with a suitable basis on which to take up and consider the proper standards under the Due Process Clause for assessing adequacy of representation in class action litigation.

C. There is no conflict among the appellate courts justifying review in this Court.

Petitioner's claims of a supposed conflict among the appellate courts are likewise unsubstantiated. The cases cited by petitioner as evidencing a conflict in authorities are not constitutional decisions *at all*. They are decisions by federal appeals courts addressing the adequacy-of-

representation requirements under Federal Rules 23 or 23.1 as they applied in particular factual circumstances. *See Berger v. Compaq Computer Corp.*, 257 F.3d 475 (5th Cir. 2001);[3] *Griffen v. Carlin*, 755 F.2d 1516 (11th Cir. 1985); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000); *Lewis v. Curtis*, 671 F.2d 779 (3d Cir. 1982); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072 (2d Cir. 1995); *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991). These cases are inapposite because they do not decide the constitutional issue on which petitioner seeks review.

Even if the cases cited by petitioner were based on the Due Process Clause instead of the federal class action rule, no conflict would be presented by this case. These

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[3] Although the Fifth Circuit in *Berger* observed that the adequacy-of-representation requirement has "[c]onstitutional dimensions" which implicate "due process rights," the decision was explicitly based on "whether the court applied the correct legal standard in determining the adequacy of the class representatives *under rule 23*." *Berger*, 257 F.3d at 479 (emphasis added). Petitioner quotes the case as holding that "[The Due Process Clause] require[s] the class representatives to possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation." Pet. at 8. The reference to the Due Process Clause in this quotation was added by petitioner and does not accurately describe the opinion of the court. The Fifth Circuit never indicated that these were requirements of constitutional due process. On the contrary, the court made it clear that this standard is an articulation of "*rule 23(a)'s* adequacy requirement," *not* the Due Process Clause. *Berger*, 257 F.3d at 479 n.7 (emphasis added). In other words, by selective quotations and additions of text not found in the Fifth Circuit's opinion, petitioner distorts and contorts an interpretation of the federal rule into a constitutional standard. Whatever the standard articulated in *Berger*, there is no conflict between that case and the decision below. Moreover, upon reconsideration, the Fifth Circuit amended the opinion stating that in enacting the Private Securities Litigation Reform Act of 1995, Congress did not intend to change the adequacy of representation requirement under Rule 23. *Berger* v. *Compaq Computer Corp.*, 279 F.3d 313 (5th Cir. 2002).

decisions were factually specific evaluations of particular facts and circumstances as governed by well-established due process requirements.

In any event, the standards articulated by the courts are not in conflict. For example, petitioner cites *Rand*, 926 F.2d 596, as evidencing a particularly demanding standard for adequacy of representation. The basis for this characterization is a comment in *Rand* to the effect that "the named plaintiff must have *some* commitment to the case, so that the 'representative' in a class action is not a *fictive concept*." *Id.* at 598 (emphasis added). This articulation of the adequacy requirement does not appear stricter than that formulated in the court below and, indeed, might be less demanding.

Accordingly, petitioner fails to identify any conflict in the appellate courts, much less one of sufficient maturity and significance to warrant review in this Court.

D. Petitioner's remaining arguments are insubstantial.

Petitioner's remaining arguments are without merit. She claims, first, that this Court should grant *certiorari* because objectors will rarely have the financial stakes to seek the writ. There is no empirical evidence to support petitioner's contention in this regard.

Petitioner's argument ignores the fact that, although objectors may sometimes lack the financial stakes to seek the writ, objectors' *attorneys* (who, as here, often proceed on a contingent basis) do have the resources and incentives to do so. Petitioner also fails to explain why, if objectors will rarely appeal class action settlement approvals, *she* has chosen to do so—especially since there appears to be nothing about petitioner that would distinguish her from the many other objectors who appear in fairness hearings on class action settlements.

In fact, opponents of class action settlements *have* found the resources to take appeals and other legal challenges, including petitions for *certiorari*. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995). Only this year, this Court held that objectors in federal class actions have standing to appeal even if they do not intervene in the proceedings. *Devlin v. Scardelletti*, 122 S. Ct. 2005 (2002). There is no merit to petitioner's argument that this Court should reach out for the instant case because another may not come along.

Citing nothing but a few newspaper or magazine articles, petitioner also argues that this case somehow presents an issue of national significance. But a computer search of a periodicals database will reveal criticism of almost any feature of modern life. It is hardly surprising, therefore, that some (but clearly not all) commentators criticize aspects of class action practice. Further, the newspaper articles that petitioner cites do not appear directed at the particular issue on which petitioner seeks review—the constitutional standards for adequacy of representation by representative plaintiffs. They appear to be general critiques of class action litigation or attacks on one of the leading firms in the securities class action field, which happens to be co-lead counsel in this case. These do not establish that the decision below presents an issue of overriding public importance. No issues of national significance turn on the resolution of petitioner's objections to the settlement of this routine state law shareholder class action.

Conclusion

The petition should be denied.

Respectfully submitted,

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Anthony Marotta

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APPENDIX

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR THE NEW CASTLE COUNTY

CONSOLIDATED CIVIL ACTION NO. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DEPOSITION of ABBEY GARDY, LLP, by ARTHUR N. ABBEY, taken at the offices of Fink & Carney Reporting and Video, 39 West 37th Street, 6th Floor, New York, New York 10018, on Tuesday, August 21, 2001, commencing at 2:05 o'clock p.m., pursuant to Notice, before Ralph Fink, a Certified Shorthand (Stenotype) Reporter and Notary Public within and for the State of New York.

* * *

[7] Q: Who would know the answer to that question?

A: The people in the firm who normally handle that.

Q: For example, Ms. Fisch?

A: Ms. Fisch, Mr. Gardy. Maybe—there may be others, but I don't know.

* * *

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Consolidated Civil Action No. 18219 NC

In re INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

AFFIDAVIT OF ANTHONY MAROTTA

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Anthony Marotta, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action. I submit this affidavit in support of class certification and approval of the proposed settlement of this action.

2. At the time of filing of the complaint and at all relevant times through the transaction at issue in the Action, I owned the common stock of Infinity Broadcasting Corporation ("Infinity") and I am a member of the class for which certification is being sought.

3. I have never had any business or social relationship with any of the defendants in the action. My claim is typical of the claims of all holders of the Class A common stock of Infinity and I have no claim or interest of any kind that is adverse to Infinity or holders of its Class A common stock.

4. Based on the foregoing and the reasons stated in the papers submitted in support of the proposed settlement, I believe that the proposed settlement is fair, reasonable and adequate and should be approved by the Court.

/s/ ANTHONY MAROTTA

Sworn to before me this
21st day of September, 2001

/s/ NANCY KABOOLIAN
NOTARY PUBLIC

NANCY KABOOLIAN
Notary Public, State of New York
No. 30-4742784
Qualified in New York County
Commission Expires March 30, 2003

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Consol. C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

STATE OF NEW JERSEY)
) ss.:
COUNTY OF BERGEN)

AFFIDAVIT OF EUGENIA GLADSTONE VOGEL

EUGENIA GLADSTONE VOGEL, being duly sworn, deposes and says:

1. I am one of the plaintiffs in the above-captioned action. I make this affidavit in support of plaintiffs' application for approval of the settlement of this class action.

2. I was a holder of Infinity Broadcasting Corporation ("Infinity") stock at the inception of the litigation and held these shares throughout the class period. I am a

member of the class for which certification is being sought.

3. I have never had any business or social relationships with any of the defendants, and I have no claim or interest that is adverse to Infinity or its public shareholders.

4. For the reasons stated in the papers submitted in support of the proposed settlement, I believe that the proposed settlement is fair, reasonable and adequate, and should be approved by the Court.

/s/ EUGENIA GLADSTONE VOGEL
Eugenia Gladstone Vogel

Sworn to before me this
14th day of September, 2001

/s/ GILBERT DOMINGUEZ
Notary Public

GILBERT DOMINGUEZ
A Notary Public of New Jersey
My Commission Expires Dec. 15, 2003

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CONSOL. C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DECLARATION OF U. SETH OTTENSOSER

I, U. SETH OTTENSOSER, hereby declares under penalty of perjury as follows:

1. I am associated with the law firm of Milberg Weiss Bershad Hynes & Lerach LLP, one of plaintiffs' Co-Lead Counsel in the above-referenced case (the "Action").

2. My firm has represented Eugenia Gladstone Vogel ("Ms. Gladstone Vogel") for many years and I have worked directly on several of those matters.

3. While the negotiations in this Action were ongoing, I regularly consulted with Ms. Gladstone Vogel. Before an agreement in principle on settlement terms was reached, I conveyed the proposed terms to Ms. Gladstone Vogel, explained events in the litigation to her and advised her of the risks of further litigation. Ms. Glad-

stone Vogel advised me that she agreed with the terms of the proposed settlement and authorized Milberg Weiss to settle the matter.

4. During the course of the Action, I worked closely with Steven G. Schulman of my office, and advised him of my litigation-related activities and communications with Ms. Gladstone Vogel.

Sworn to on this 20th day
of September, 2001
New York, New York

/s/ U. SETH OTTENSOSER
U. SETH OTTENSOSER

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

Chancery Courtroom No. 106
Daniel L. Herrmann Courthouse
Wilmington, Delaware
Tuesday, September 25, 2001
11:09 a.m.

BEFORE: HON. WILLIAM B. CHANDLER, III, Chancellor.

SETTLEMENT HEARING

APPEARANCES: NORMAN M. MONHAIT, ESQ.
Rosenthal, Monhait, Gross & Goddess

—and—

ARTHUR N. ABBEY, ESQ.
KARIN E. FISCH, ESQ.
of the New York Bar
Abbey Gardy, LLP.

—and—

STEVEN G. SCHULMAN, ESQ.
U. SETH OTTENSOSER, ESQ.
of the New York Bar
Milberg Weiss Bershad Hynes & Lerach
for the Plaintiffs

---

[8] MR. ABBEY: When we started the action in August and in September, there were discussions that I personally had with Mr. Baskin, the partner in charge of the matter at Shearman & Sterling. He represented Viacom. We indicated to him that we thought that the .564 offer was inadequate. At the same time, the [9] plaintiffs retained an expert to assist them in evaluating the offer. And that's Mr. Wilbur Ross, of WL Ross. There is an affidavit on file from him.

During the period August, September and through mid-October, we received documents to review from the defendants. And as October started to move along, in the middle of October, the defendants decided to share with us the work that was done by their financial advisors; not only the financial advisors for the special committee, but the financial advisors for Viacom, as well. These were detailed financial analyses, determining what an

appropriate exchange ratio would be. That was followed by high level meetings on October 25th and October 26th in New York, attended by attorneys, bankers and other experts.

As a result of those extensive meetings in New York, where we shared ideas and we told the defendants that we thought the .562 was—.564 was inadequate, on October 27th, after much discussion—these dates are important in connection with the objection. On October 27th, I informed Mr. Baskin, on behalf of all of the plaintiffs, that the .592—an increase from .564 to .592 would be [10] satisfactory.

It is absolutely true that during the course of the discussions prior to that we tried to get a higher number. We talked about numbers that began with a .6. We were told that was not in the cards; the highest that they could go would be from .564 to .592. At the time, that represented an increase of approximately 5 percent. It amounted to $1.50 a share for each Infinity share, and collectively, on the 391 million shares, $1.50 increase at the time amounted to approximately $600 million. We were told that the reasons, among others, for why Viacom would not go higher at that point in time was because the stock of Infinity in that period prior to August 14th—there were rumors around that Viacom might be interested in buying the rest of Infinity. As a result, Infinity was trading not so much necessarily on the fundamentals of itself, but also on the fact that there might be a takeout by Viacom of the Infinity stock.

And all of that was taken into account by our expert. We reviewed the work of the special committee. We reviewed Goldman Sachs' financial analysis. We did agree, and I agreed, on [11] October 27th.

At the same time that we were doing our negotiations, on a parallel track the special committee, its financial

advisors and its lawyers, were also discussing the transaction. I will tell you that when we met with the counsel for the special committee and counsel for Viacom, both on the 25th and 26th of October, we were told, yes, there were discussions going on, but there were absolutely no agreements between the special committee and Viacom as to what an appropriate price would be. The number .592 had been discussed between the special committee at that time, but it was subject to—and it had not occurred until October 30th, three days later. It was subject to an opinion of the bankers, saying that .592 was fair. It was also subject to the Infinity board meeting and approving.

That was done. That was done on the morning of October 30th. An oral opinion was given by the special committee's bankers that the price was fair. And on the evening of October 30th, Viacom's board met and approved an increase in the exchange ratio from .564 to .592.

All of that, Your Honor, occurred [12] three days after we had agreed that we would accept .592. And so I raise that because there is some, in the papers of the objectors, question that as of October 23—even though there had been discussions between the special committee and Viacom as to increasing the exchange ratio to .592, I will tell you that we were expressly told there was no deal at .592. But at any event, at .592 it required approval of the bankers and the Viacom board, and the public documents indicate that did not occur until October 30th.

Again, I point out there was no deal between the special committee and Viacom on October 23rd. It did not occur until October 30th. Indeed, the merger agreement itself was dated October 30th. Could not have been an agreement at .592 until the merger agreement had been signed by both sides.

Now, we have been given credit for participating. This is a shared-credit case. The settlement agreement says, and says it in bold print, that the litigation was a positive factor in increasing the merger consideration.

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR THE NEW CASTLE COUNTY

CONSOLIDATED CIVIL ACTION NO. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DEPOSITION of STEVEN G. SCHULMAN, taken at the offices of Fink & Carney Reporting and Video Services, 39 West 37th Street, 6th Floor, New York, New York 10018, on Thursday, August 23, 2001, commencing at 10:00 o'clock a.m., pursuant to Notice, before Ralph Fink, a Certified Shorthand (Stenotype) Reporter and Notary Public within and for the State of New York.

* * *

[82] Q Okay. After the cases were consolidated on or about August 30th of 2000, what, if anything, was done with respect to this litigation?

A The Plaintiffs' counsel continued their factual investigation, retained independent financial advisor, and served documents requests and commenced discussions with Viacom counsel about the perception that the .564 was an inadequate price.

Q Let's take—

A Those are the primary things that I recall. There obviously may have been others.

[83] Q Okay. How did lead counsel, on August 30th of 2000 continue the factual investigation? What was done?

A We continued our review of publicly available materials. We consulted with our financial advisor, and drew on his expertise.

And, again, then I would recall that we made requests in addition to formal requests, for documentary information from the Defendants or their counsel. And this is how it was begun.

Q Mr. Schulman, I was going to ask you that you continue on, if you want, I guess that is fair and I will continue.

With respect to the document request, did you receive documents from the Defendants?

A Yes, we did on a number of occasions.

* * *

[114] Q When was the first time there were Settlement discussions in your view?

A Well, like I said, there was a whole series of discussions, communication, in my view, and as I understand the facts, as recited in the Stipulation of Settlement, and in the Settlement discussions, if only preliminarily, commenced [115] within days or weeks of the commencement of the litigation and it continued throughout months of September and October, 2000. This is what the actual Stipulation of Settlement recites.

Q Were you involved in the Settlement negotiation?

A As allied counsel, with Mr. Abbey and I knew of, or what was directly involved in such discussion.

Although I wasn't a direct participant in such communication, was Mr. Abbey was a direct participation in every such communication but we did obviously definitely as a team.

Q Okay. You now talked about this continuum.

Can you discuss with specificity when the first conference in this continuum took place?

A I cannot specify, but I believe generally we began to communicate our concerns about the .564 obviously with challenge in the Complaints, so I will consider for the first hostile communication by us.

[116] In the sense that, of attacking the transaction. Not in the sense of going to war, obviously.

The discussion of the possibilities of an enhancement, I think, was undertaken by Mr. Abbey or by myself beginning of September, 2000.

* * *

[121] Q Mr. Schulman, at some point you on behalf of the class informed Mr. Baskin that you had some trouble with .564 exchange ratio.

Is that fair?

A I believe that I, as a representative of my firm, which is a court appointed lead counsel, stated to Mr. Baskin in no uncertain terms that our assessments that the .564 was inadequate and should be changed to make it greater.

* * *

[175] Q What documents did you see that supported that position?

A The materials that were exchanged between the parties of the investment bankers which I indicated before

I couldn't discuss in detail, it was the case at the meeting, which I knew occurred the day before more, I think more significantly there were candid discussions. This occurred on the 26th. They were candid, high level discussion completely open, between us and the representatives of Deutsche Bank, Bear Stearns and as to their analyses, and our perspective on those analyses, and based on that dialogue which I think took place over hours, we were of the view that to say .6 or better was a very reasonable demand, a demand, for purposes of resolving the litigation.

Q Did you testify in that answer about [176] the content of the October 25, 2000?

A I knew there then had been general discussion between the representatives of the Viacom investment banker and our people and had a general sense that the Viacom representatives at that time felt that 564 was a fair price. And had defenses to that price. So they felt strongly.

This was my impression, that they felt strongly, that that price was a good one, particularly in light of the negative trend in the radio industry, between April and August and October, which in their view diminished the value of Infinity. There was their view.

So then when we discussed with Special Committee the views, which, of course, you know, we, being more inclined, we will hope, towards increasing the price and which we reviewed their material and we learn about the various arguments and Colorado or argue about the change, when we had the benefits of Mr. Ross' input and we talked all through, it was our professional judgment, in our experience and our knowledge of the law, and our knowledge of the facts, that a very smart proposal was to say, in light of all [177] that was going on then, we want to see a number with a 6 in front of it.

That was our position, that was our negotiating posture. That was the demand we made, as a result of all these exchanges that occurred.

Q When that was said on behalf of Plaintiffs, were you expecting a range of between .564 and .6?

A No. Obviously we rejected 564.

So we couldn't have accepted 564 as being any acceptable range.

We simply said that it should be .6 or higher. And this was our negotiating demand period, end of story.